

# It can happen here

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Maximilian Steinbeis Sa 20 Jan 2018

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On Sunday, the SPD will hold its federal party convention, and then we will know whether Germany can expect to get a government capable of acting in the near future. For the time being, all we can do is wait and speculate about the future, about minority governments, about new elections, what the Federal President will do, what will become of Social Democracy, what of Germany, what of Europe...

The speculation that has kept me busy this week has little to do with the SPD and all the more with Germany. What, I wondered, would happen if an proto-authoritarian party like the Hungarian Fidesz or the Polish PiS ever got a majority here? What damage could such a majority do while staying all the time, at least nominally, strictly within the framework of the constitutional order, without a coup d'état, without dissolving any institutions and without sending anyone to prison? How much protection against that contemporary form of proto-autocracy – ‚authoritarian legalism’ is what Kim Scheppele and Javier Corrales call it – does the German *Grundgesetz* offer?

The one strand of speculation that really gives me goosebumps is about the Federal Constitutional Court.

Assume there was a majority in the Bundestag that decides that an overly strict control by the Constitutional Court is undesirable for what it intends to do. (If you consider this scenario unrealistic, I'd gently ask you to remember what you considered unrealistic before the 23rd of June and the 8th of November 2016, respectively.) What could this majority do to tie down the Court without openly violating of the constitution?

They could try to replace the judges with their own acolytes, of course, and thereby try to change the majority in the court, as happened in Hungary and Poland. In principle, a simple majority in parliament is sufficient to shorten the 12-years term of office of the judges or reduce their age limit of 68, as neither of those are constitutionally fixed. To throw out sitting judges in this way would, however, cause serious legal conflicts, not just in terms of judicial independence, but also because that would infringe on the rights of other constitutional bodies: Constitutional Court Justices are alternately elected by the *Bundestag* and the second chamber, the *Bundesrat* representing the states, and in each case by a two-thirds supermajority. A simple majority can't undo what a supermajority has done. With newly elected judges, on the other hand, a simple majority is free to shape the term limits as it sees fit. Cut it down to eight, six, four, three years? Introduce the possibility of re-election, so that the judges know to behave themselves if they want to keep their job? In term of constitutional policy highly questionable, of course. But until 1970 judges could be re-elected after their terms expired. Was that unconstitutional then, as well?

Anyway, that's not going to do the trick. Until the day the newcomers are finally numerous enough to take control, our parliamentary majority may already be voted out of office. But there is nothing to stop the federal legislator from creating a whole bunch of new posts for

judges to be filled at the majority's whim (after abolishing the two-thirds majority requirement, of course): Hungary is a role model again. Set the number of judges per senate up from eight to twelve, as was the case before 1956 – and boom, eight new people you can elect at one swoop (four of them by the *Bundesrat*, though). Even more interesting: You could also increase the number of senates from two to three. And regulate the competences of the Senates in such a way that this new third Senate gets to review the things that one plans to do. Doesn't the court always complain that it's overburdened? Happy now?

You could also think of clipping the court's procedural wings. The *Grundgesetz* stipulates that the Federal Constitutional Court decides on the compatibility of federal and regional laws with the Constitution, but not with which majority. So why not demand a two-thirds majority in the Senate if it wants to overturn a law as unconstitutional? Three dissenting judges suffice and the law stands, no matter how dubitable its intentions. Two-thirds majorities are already required to ban a party and to indict federal judges or the President. Oh, it would be terribly authoritarian to contemplate such a thing? I seem to remember that it was CDU politicians who came up with precisely that idea time and again in the last decades...

## Anklam is a nice place, too

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There are some other things you might think of that you'd never have to actually do. In the run-up to a particularly sensitive decision, one could noisily cogitate about the fact that the cosy, economically and climatically privileged Upper Rhine valley is maybe not the best place to bring the BVerfG into closer contact with the bleaker aspects of German reality. Anklam in Western Pomerania would certainly be pleased to accommodate the Federal Constitutional Court. Karlsruhe is familiar and comfortable, for sure. But the seat of the court is determined by the federal legislator. And that most of the employees would quit, that a large part of the court's whole basis of knowledge and experience would break away, just the way it did with the Russian Constitutional Court at its forced relocation to St. Petersburg in 2008 – well, that's their problem, isn't it?

Could the Constitutional Court adjudicate amendments to its own procedural act? It would certainly try. But judging on one's own cause is always problematic. Especially when it comes to reviewing the procedural law which regulates the procedure in which the Court reviews this very procedural law. The Court may find itself in a paradoxical loop which can easily be exploited by the governing majority, as the Polish so skillfully did.

And the *Bundesrat*? Amendments to the procedural act of the Federal Constitutional Court do not require the approval of the Regional Chamber. At best, it can slow the process down a little by lodging an objection. If a two-thirds majority in the *Bundesrat* votes in favour of that, the objection could also only be overcome with a corresponding two-thirds majority in the *Bundestag*. But our proto-authoritarian party, if it already has an absolute majority in the federal parliament, would most likely have at least a blocking minority of more than one third in the Regional Chamber.

Remains the Federal President. Pursuant to Art. 82 (1) of the *Grundgesetz*, he is required to formally execute federal laws which are "enacted in accordance with the provisions of

the *Grundgesetz*“. This means that the President is entitled to some form of constitutional review – but which? Only in a formal sense, or in a substantive sense, too? This is one of the classic riddles every law student of Germany has to solve at some point during law school. The correct answer is: Yes, there can be also a substantive review, but only in the event of an *obvious* violation of the constitution. To get a good grade, one should also mention that the framers of the *Grundgesetz* learned from the Weimar Republic and did not envision a presidential “guardian of the constitution”. In short, the Federal President may be a fallback option to be reckoned with, but what he can accomplish depends a lot on his own temerity and on the skills of the lawmakers who formulate the law in question. And the President mustn’t be a proto-authoritarian party man himself, of course. In Poland we witnessed how much fun such a party can have in a game with distributed roles between head of state and legislator.

The conclusion seems to me to be that our constitution, for all its militant democracy valour, will not protect us from that contemporary variety of authoritarian legalism. Our liberal democratic constitutional state would not be immune to the authoritarian infection and zombification of its institutions. *If* an authoritarian-legalist party ever gets a majority in Germany. To prevent that from happening is not the job of the constitution. It’s ours.

## Civil servants

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On Verfassungsblog this was one of the quieter weeks. In **Germany**, the hottest topic, besides the ongoing woes of governing-forming, was the hearing before the Federal Constitutional Court on the question of whether civil servants of the state should be granted the right to strike, in addition to all the privileges they enjoy “with due regard to the traditional principles of the professional civil service” (Art. 33 (5) of the Basic Law). The European Court of Human Rights in Strasbourg has found the civil servants’ right to strike to be legitimate in Turkey, so Karlsruhe must once again consider how to fit the German constitutional law as evolved over time into the European fundamental rights architecture without causing too much damage on either side. [GABRIELE BUCHHOLTZ](#) comments.

From **India**, [ADEEL HUSSAIN](#) reports on the point-blank accusations four of the most senior Supreme Court Justice have brought against their Chief Justice, whom they publicly accuse of using his administrative competences in an intolerably high-handed and politically lopsided way.

Our online symposium on memory politics and law ended this week. [TOMASZ KONCEWICZ](#) focuses on the **Polish** government’s attempts to establish its nationalist narrative of Polish history. And [IOANNA TOURKOCHORITI](#) reports how explosive it can be in **Greece** to open certain chapters of national history with a critical mind. [ULADZISLAU BELAVUSAU](#) summarizes the results of the symposium.

## Elsewhere

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The [JUWISS blog](#) of young public law academics in **Germany/Austria/Switzerland** celebrates its fifth anniversary – congratulations!

MANUEL MÜLLER proposes to alleviate the problem of unequal voting weights in the European Parliamentary elections by means of transnational lists (in German).

JÖRN REINHARDT presents the controversial **German** Network Enforcement Act and its consequences and problems to his French readers (in French).

ANGELO SCHILLACI analyses the recent ruling of the **Italian** Constitutional Court on the challenge of paternity recognition abroad (in Italian).

ANTONIO ARROYO GIL calls for a federalist solution to the **Catalan** crisis (in Spanish).

MIGUEL ÁNGEL PRESNO LINERA disentangles the argumentation of the **Spanish** judiciary, which refuses to allow the imprisoned ERC politician and Catalan secessionist Oriol Junquéras to attend the sessions of the Catalan parliament, and sees a kind of “criminal procedure of the enemy” along the lines of Günther Jakob’s theory at work (in Spanish).

INGRIDA MILKAITE reports on an ECHR Chamber judgment in an **Icelandic** case that states that the term *rapist* in a polemical Instagram post against an allegedly sexist radio host is a statement of fact that no one who hasn’t actually raped anyone has to put up with.

PIERRE DE VOS reflects, on the occasion of proposals to legalise the expropriation of land in **South Africa** without compensation, on the amendment procedure for the South African constitution.

LUKE BECK states, just in case, that the Constitution of **Australia**, unlike the British, would also allow a Muslim, Catholics or other Non-Protestants to succeed Queen Elizabeth as head of state.

So much for this round. Have a good week, all best and take care,

Max Steinbeis

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